80-1019

Supreme Court, U. S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHRISTOPHER JASTRZEBSKI,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's confession was involuntary (and, therefore, with its fruits inadmissible) when it was induced by a government agent's promise to make petitioner's cooperation known to the prosecuting and sentencing authorities, particularly where other circumstances strongly suggest that the agents urgently desired petitioner's assistance?

2. Whether petitioner was deprived of his right to a fair jury trial on the issues of voluntariness of his confession and guilt or innocence of the crimes charged, where, to protect the rights of a non-confessing co-defendant, the jury was not allowed to hear the tape constituting petitioner's confession, which would have shown his demeanor and reluctance to respond to leading questions, but where the jury heard instead a brief summary of some parts of the confession related in narrative form by a government agent?

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ON WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Jastrzebski respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the

Third Circuit entered in this case on September 23, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit has not been reported. The Judgment Order of the Court is reprinted in the Appendix at A.1.

The ruling of the District Court on the first question presented was not reported and is reprinted in the Appendix at A.3-8. The ruling of the District Court on the second question presented was not reported and is reprinted in the Appendix at A.29-36.

JURISDICION

The judgment of the Court of Appeals was entered on September 23, 1980. No petition for rehearing was filed. The time within which petitioner might file this petition for writ of certiorari was extended until December 22, 1980, by order of Mr. Justice Brennan dated November 6, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

No person . . . shall be compelled in any criminal case to be a witness against himself.

STATEMENT OF THE CASE

After a jury trial, petitioner was found guilty of various violations of the federal narcotics laws and was sentenced to imprisonment for 15 years.[1/] The evidence against him included oral statements made by him to federal officers the night of his arrest, and drugs and other property seized

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1/ Petitioner was convicted on two counts of conspiracy to manufacture and distribute controlled substances in violation of 21 U.S.C. § 846, four counts of distribution of controlled substances in violation of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2, and two counts of possession of controlled substances with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The substances were phencyclidine ("PCP") and 4-bromo-2, 5 dimethoxyamphetamine ("4-bromo").

from the apartments of his brother and his girl friend that night as a result of his oral statements. Petitioner's pre-trial motion to suppress this evidence on constitutional grounds was denied after a hearing. (A.3-8) The issue of voluntariness of petitioner's confession was submitted to the jury (A.42-43), but the jury did not hear the confession in the question and answer form in which it had been made. Rather, ostensibly to protect the rights of co-defendants referred to in the statements and over objection by petitioner, the confession was related to the jury in narrative form. Petitioner's arguments that these rulings were erroneous were considered by the Court of Appeals but rejected (A.1-2).

Petitioner is a college graduate with a degree in chemical engineering. He had never been arrested before 7:00 p.m. on May 29, 1979, when he and co-defendant Joseph Martier were arrested in a bar in a shopping

center near Pittsburgh. The arrest occurred soon after Martier had delivered a quantity of PCP to an informant. Several agents of the federal Drug Enforcement Administration ("DEA") and of state police agencies participated in the arrest and in subsequent proceedings that evening. The defendants were removed from the bar to a hallway, patted down for weapons, and advised of their constitutional rights in conformity with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966). Each indicated that he understood his rights, although neither was asked whether he wanted to waive or to assert any right. (M. Tr. 4-7, 14-15, 26, 63-65, 115-16, 261, 433-34, 436).[2/]

Petitioner and Martier were then transported separately to DEA headquarters in

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2/ References to "M. Tr." are to the transcript of the hearing on the motions to suppress held September 17-19, 1979. "T. Tr." refers to the transcript of trial.

Pittsburgh. During the ride to headquarters, petitioner was advised by Agent Guseman that he was charged with "a very serious crime", that he "might give some consideration to cooperation with law enforcement authorities", and that any cooperation he gave "would be brought to the attention of the United States Attorney's Office, and to the trial Judge." Petitioner said he understood what the agent was saying. There was no discussion of the facts at that time. (M. Tr. 434-35).

Shortly thereafter, as Agent Sye was processing petitioner at headquarters, he asked whether petitioner "would be interested in cooperating . . . by providing . . . information regarding his role in [the illicit] activities." Petitioner indicated that he was interested. (M. Tr. 224).

Between 8:30 and 8:45, Agent Frank Schmotzer entered the processing room and again advised petitioner of his rights, which petitioner indicated he understood.

(M. Tr. 226, 362-63). Schmotzer told petitioner, "You realize the extent of your involvement. I'm not going to debate it with you." He said petitioner had been arrested for delivering a substantial quantity of illicit drugs and that the maximum penalty for these offenses was ten years in prison. He asked if petitioner wanted to cooperate; petitioner answered that he did. Although Schmotzer did state that sentencing was the responsibility of the court, he specifically promised petitioner that any cooperation he gave would be made known to the United States Attorney and to the Judge before sentencing. (M. Tr. 226-27, 363-64, 394-97). Petitioner then told the agent, in response to a question, that the drugs delivered to the informant that evening had been made at his brother's apartment. (M. Tr. 363).

Next, Schmotzer asked that petitioner demonstrate his sincerity by turning over

any drugs that he had stored away. Schmotzer claimed that his primary purpose was to get the drugs off the street into DEA custody so that no one would be injured. Petitioner agreed to cooperate "in that area". (M. Tr. 227, 364-65). He admitted there were some drugs at his brother's apartment, but insisted that his brother, a doctor, had no knowledge of the illicit manufacture. Voicing his concern that his brother not become involved, petitioner agreed to provide a consent to search his brother's apartment. (M. Tr. 227-28, 244, 363-66, 437). Thereafter, several agents drove petitioner to his brother's apartment where petitioner assisted the agents in locating the contraband. (M. Tr. 228-30, 366-69, 438-40). Returning to DEA headquarters about 11:00 p.m., petitioner was placed in a holding cell area in the company of Agent Sye. (M. Tr. 231, 369).

In the meantime, Martier had given the agents a lengthy account of the conspiracy, including details of petitioner's role, and had relinquished custody of various drugs, chemicals, manufacturing equipment, and text-books kept in two separate locations in the area. (M. Tr. 37-38, 66-68, 71-74, 118-32). Early in the evening, Martier had asked for the opportunity to persuade petitioner to join him in cooperating, but the agents had rejected this request. (M. Tr. 34, 68-69, 225-26, 391-92). However, at 11:30 Martier was brought into the room where petitioner was being held. He immediately informed petitioner that he had given the agents "everything" and tried to persuade petitioner to cooperate also. Petitioner responded with an expression of disgust. (M. Tr. 74-75, 231-32). Within moments, Agent Sye and Detective Ramsey warned petitioner and Martier that they were to be taken to the Allegheny County Jail to await arraignment

in the morning.[3/] They discussed how petitioner and Martier could protect themselves in the jail, which was notorious for physical assaults, including homosexual assaults. The officers said they would try to have petitioner segregated for his own safety. (M. Tr. 75-76, 83-84, 233-36).

Schmotzer soon reappeared and took petitioner into a private office where he asked him to give a detailed account of his role in the offenses. He reiterated that petitioner would be spending the night in jail. Petitioner agreed to give a statement, and was readvised of his rights. During the next two and three-quarters hours, with a

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3/ Agent Schmotzer had called the U.S. Magistrate at 8:20 and requested that both defendants be held on a high bond. The Magistrate authorized him to lodge both defendants overnight at the jail and scheduled a bond hearing for the morning. Generally, the record shows, persons arrested after 8:00 p.m. are released on their own recognizance pending a formal hearing in the morning. (M. Tr. 350-53, 355-57, 361, 388-90).

short break for sandwiches, Schmotzer and petitioner discussed the facts in preparation for the taping of a statement. The taping itself took only 40 minutes and was preceded by a further advice as to petitioner's rights. (M. Tr. 365, 370-73, 398, 407, 410). The tape ends with a statement that petitioner had not been promised anything in connection with it. (M. Tr. 373). The taped statement appears at A.9-28.

After the statement was finished, petitioner was left with Agent Guseman. Guseman asked whether there were any drugs at the apartment of a woman with whom petitioner had been staying. Petitioner admitted there was some contraband there but insisted that the woman was not involved. Guseman reiterated that they had "got to get the stuff off the street." Petitioner agreed to surrender this material if the agents promised not to involve his friend. (M. Tr. 443-44). Thereafter, several agents

took petitioner and Martier to this apartment, where additional contraband was recovered. (M. Tr. 375-77, 444-46).

In fact, neither petitioner nor Martier was incarcerated in the county jail that night. Instead, they were allowed to stay at DEA headquarters until the courthouse cellblock opened. At the bond hearing before the magistrate, each was released on his personal recognizance, pursuant to the recommendation of the prosecutor after consultation with Agent Schmotzer and based on their cooperation with the agents. (M. Tr. 377-78, 417-19, 446).

The trial judge denied petitioner's motion to suppress his taped confession, all oral statements, and all physical evidence obtained as a result of the oral and taped statements. The judge found that petitioner had been advised of his rights under Miranda upon arrest, prior to questioning at DEA headquarters, and prior to giving the taped

statement. By reference to his ruling on Martier's motion, the judge also found that petitioner's statements were voluntary. (A.3-8).

At the trial, petitioner's taped statement was not offered in evidence. Rather, because the taped statement referred to Martier and to another co-defendant who had not confessed, Agent Schmotzer, over petitioner's objection, was permitted to relate the contents of the statement essentially in narrative form. (T. Tr. 669-80, 1366-67, 1373-75; A.37-41). The issue of voluntariness of the statement was submitted to the jury under appropriate instructions. (A.42-43).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW UPHOLDING THE TRIAL COURT'S FINDING THAT PETITIONER'S ADMISSIONS AND CONFESSION WERE VOLUNTARY IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court should grant certiorari in this case to resolve an important and recurring question of constitutional law: whether

an arresting officer's promise to advise the prosecutor and the trial judge of any cooperation given by a person under arrest constitutes an improper inducement rendering subsequent admissions involuntary. Despite this Court's repeated emphasis that any inducement, however slight, will render a confession involuntary, the court below, and numerous other federal and state courts, have held that such promises of assistance are not improper. This case presents an appropriate opportunity to clarify this application of constitutional principle.

The classic description of the kind of inducement that will render a confession involuntary was set out by this Court eighty-seven years ago, in Bram v. United States, 168 U.S. 532, 542-43 (1897), with the following quotation from a noted authority on criminal law:

> . . . a confession, in order to be admissible, must be free and voluntary: that is, must not be

> extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. (Emphasis added.)

The rule is clear: the slightest promise made to a person in custody will make his subsequent statement involuntary.

That the most minimal promise constitutes an improper inducement that will render a confession involuntary is clear from a review of the cases relied on in Bram, cases where the prisoner was advised "the best thing you can do is to tell all about it . . . and to tell the truth," or "it will be better for you to make a full disclosure," or "[i]t may be best for you to tell it," or "if you are guilty, I would advise you to make an honest confession; it might be

easier for you. It is plain against you." Bram v. United States, supra, 168 U.S. at 560-61. Bram himself had made an inculpatory admission after hearing that another person suspected of the murder had accused him. The court held that the result of this advice "was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt . . . and . . . that by denying there was hope of removing the suspicion from himself." Id. at 565. Bram's statements had been influenced by the officer's information about the accusation and therefore were inadmissible.

Through the years, this Court has never questioned the principle that a confession that is "the product of coercion, either physical or psychological", is involuntary and that a conviction "following the admission into evidence" of such a confession

cannot stand.[4] Rogers v. Richmond, 365 U.S. 534, 540 (1961). See Hutto v. Ross, 429 U.S. 28, 30 (1976)(per curiam); Brady v. United States, 397 U.S. 742, 754 (1970); Malloy v. Hogan, 378 U.S. 1, 6-7 (1964); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347-48 (1963). Nor has this Court retreated from the application of this principle as enunciated in Bram, that the slightest inducement will render a confession involuntary.[5]

The directives of this Court have been heeded by several of the federal circuit

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4/ The doctrine of harmless error cannot be used to sustain a conviction where an involuntary confession has been received in evidence. E.g., Mincey v. Arizona, 437 U.S. 385, 398 (1978); Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, supra.

5/ As this Court pointed out in Malloy v. Hogan, supra, 378 U.S. at 7,

> [it has] held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. Haynes v. Washington, 373 U.S. 503.

courts of appeals, which have recognized that a confession will be involuntary if the result of a suggestion to a person under arrest that his cooperation might be beneficial to him. E.g., United States v. Powe, 591 F.2d 833 (D.C. Cir. 1978), opinion after remand, ___ F.2d ___ (1980); Grades v. Boles, 398 F.2d 409 (4th Cir. 1968); Hunter v. Swenson, 442 F.2d 625 (8th Cir. 1971), opinion after remand, 504 F.2d 1104 (8th Cir. 1974). Yet many federal courts of appeals, including the court in the instant case, have held that promises of assistance at sentencing or promises to make the fact of cooperation known to the prosecutor or the court, will not render a subsequent confession inadmissible. E.g., United States v. Fera, 616 F.2d 590 (1st Cir. 1980); United States v. Ferrara, 377 F.2d 16 (2d Cir. 1967); United States v. Perkins, 608 F.2d 1064 (5th Cir. 1979); United States v. Klein, 592 F.2d 909 (5th Cir. 1979); United

States v. Springer, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873 (1972); United States v. Curtis, 562 F.2d 1153 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); United States v. Prescott, 480 F. Supp. 554 (W.D. Pa. 1979). This, we submit, is wrong, and requires correction by this Court.

The idea that he might benefit by cooperating with the agents was implanted in petitioner's mind moments after his arrest. During the drive to DEA headquarters, Agent Guseman told him he was charged with a "very serious crime," that he "might give some consideration to cooperation with law enforcement authorities," and that any cooperation he gave "would be brought to the attention of the United States Attorney's Office and to the trial Judge." (M. Tr. 434-35). While he was being fingerprinted and photographed at DEA headquarters, a second agent asked whether petitioner would be interested in cooperating by telling the agents about his

role in the illegal activities. (M. Tr. 224). At 8:30, an hour and a half after his arrest, a third agent, Agent Schmotzer, advised petitioner that he did not want to debate the extent of petitioner's involvement in the illegal activities, that petitioner faced ten years in prison, and that, although the ultimate decision on sentencing was with the judge, he, Schmotzer, would advise both the prosecutor and the court of any cooperation petitioner might give. (M. Tr. 226-27, 363-64, 394-97). The implication was clear -- the agents strongly desired his cooperation and petitioner could avoid a long prison term by providing the agents with any information they requested. This is the very kind of inducement prohibited by Bram and its progeny. The result of the agents' promises was to interfere with petitioner's "unfettered exercise of his own will"[6/] in

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6/ Malloy v. Hogan, supra, 378 U.S. at 8.

his decision whether or not to cooperate with them and to render his subsequent statements involuntary.[7/]

In addition to the improper inducements advanced by the agents, a number of other factors contributed to render petitioner's inculpatory statements involuntary. Before his arrest that night, petitioner had had no involvement with the criminal process. He was separated from his friend Martier, handcuffed, taken to DEA headquarters, fingerprinted and photographed, and told that his guilt was undebateable and that he was facing ten years in prison. The major portion of petitioner's inculpatory statements came after he learned that Martier had

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7/ Concededly, petitioner was advised of, and understood, his rights under Miranda v. Arizona, supra. The question of voluntariness of the confession remains and is not foreclosed by petitioner's statement at the end of the taped confession that no promises had been made to him to induce the statement. (A.27) Haynes v. Washington, supra, 373 U.S. at 513.

fully cooperated with the arresting officers. Prior to that time, petitioner had not provided any details about the conspiracy but had only surrendered certain tangible evidence from his brother's apartment. Martier, on the other hand, had begun confessing almost immediately after his arrest, and early in the evening had asked to be allowed to persuade petitioner to cooperate also. (M. Tr. 34, 37-38, 66-69, 71-74, 118-32, 225-26, 391-92). When petitioner and Martier were placed together at 11:00 p.m. and petitioner learned that Martier had given the agents "everything," petitioner's reaction was one of disgust (M. Tr. 74-75, 231-32), suggesting that he had not decided to cooperate fully with the arresting officers. Learning of his friend's cooperation, however, petitioner could only conclude that there was no chance of acquittal and that his only hope of avoiding a ten year prison term was to answer the agents' questions and

thus merit a favorable recommendation to the prosecutor and the court. The officers' discussion about the horrors of jail which followed immediately upon the revelation of Martier's cooperation (M. Tr. 75-76, 83-84, 233-36) must have impressed upon petitioner the importance of avoiding incarceration.

Finally, petitioner was concerned to protect his brother and his girl friend, at whose apartments contraband remained. Reasonably, he could conclude that if he surrendered drugs and equipment to the agents and assumed ownership of this material, the agents would forego prosecution of either the brother or the friend. Indeed, the record shows that petitioner led the agents to the drugs at the friend's apartment only after eliciting a specific promise that the woman would not be charged. (M. Tr. 443-44).

In the circumstances, therefore, "even a mild promise of leniency" should be "deemed sufficient to bar the confession, . . .

because defendants at such time are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady v. United States, supra, at 754, referring to Bram v. United States, supra; see Commonwealth v. Meehan, 387 N.E.2d 527 (Mass. 1979), cert. dismissed, ___ U.S. ___ (1980). This case presents an appropriate occasion for this Court to reiterate in unmistakeable terms that any promise made by a law enforcement officer to a person in custody will render involuntary a confession made as a result of that promise, and to clarify the conflicting opinions of the courts of appeals on this question.

II. THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION WHETHER A CONFESSION CAN BE REDACTED TO PROTECT THE RIGHTS OF A CO-DEFENDANT, WHEN THE EDITING SO DISTORTS THE CONFESSION AS TO TAINT THE JURY'S FINDING ON THE ISSUE OF VOLUNTARINESS.

The trial court in this case, following the procedure mandated in Jackson v. Denno,

378 U.S. 368 (1964), made a preliminary determination that petitioner's confession was voluntary. (A.3-8). The court then submitted the question of voluntariness to the jury, under instructions that "before considering any statement claimed to have been made by a defendant outside of court" the jury "must find that the defendant had knowingly waived his constitutional rights before giving the statement" and "also . . . that the defendant had voluntarily given the statement." (T. Tr. 1647-48, A.42-43). In determining whether or not the statements were voluntary, the jury was instructed to consider

> such factors as the age, sex, training, education, occupation and physical and mental condition of the defendant, his treatment while under interrogation, and all other circumstances in evidence surrounding the making of the statement. (T. Tr. 1648, A.43).

Patently, in order for a jury to reach a fair decision on the question of voluntari-

ness, it must have access to all evidence relevant to the issue. Surely the most probative evidence would be the demeanor of the defendant as revealed by an audio or video tape made of the confession as it was given. Although such direct evidence was available at the trial of this case, the jury was not permitted to hear the taped confession, or even to hear a transcript of the tape.

Petitioner's statement referred to two of the co-defendants who were on trial, Boyd and Martier. In order to protect the rights of Boyd, who had not confessed, the trial court refused to permit the jury to hear petitioner's confession directly. See Bruton v. United States, 391 U.S. 123 (1968).[8/] Instead, the jury heard a condensed version of

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8/ Martier's rights would not have been affected had the tape been played, because Martier himself had confessed. Parker v. Randolph, 442 U.S. 62 (1979).

the confession, given in a narrative form by Agent Schmotzer. (T. Tr. 1366-67, 1373-75, A.37-41).

The narrative testimony by Agent Schmotzer suggests nothing of the eagerness or hesitation of petitioner in giving the statement. However, even the cold transcript of the tape, which appears at A.9-28, demonstrates beyond peradventure the extreme reluctance of petitioner to provide information to the authorities. Undoubtedly the tape itself would be even more informative, since it would contain petitioner's tone of voice and reveal the existence and duration of any pauses between the questions of Schmotzer and petitioner's answers. Although the jury was asked to decide whether petitioner's confession was voluntarily given, and to weigh the confession in determining the question of petitioner's guilt or innocence of the crimes charged, the jury was deprived of the best evidence available on

the question of voluntariness. In an attempt to protect the rights of co-defendants, petitioner was deprived of his right to a fair trial.

We have been able to find no case directly addressing this issue. Dictum in some opinions suggests that redaction of a confession would be impermissible if the editing "distorts" the meaning of the confession. See, e.g., United States v. Kershner, 432 F.2d 1066 (5th Cir. 1970); United States v. Wenzel, 311 F.2d 164 (4th Cir. 1962). The Court should take this opportunity to make clear that the right of one defendant to a fair trial cannot be sacrificed to protect the right of another defendant to confront his accusers. The solution is simple -- the Government must either try each defendant separately or must forego use of the confession.[9/]

9/ The question of harmless error, Harrington v. California, 395 U.S. 250 (1969), does
[Footnote 9/ continued on Page 29.]

CONCLUSION

For these reasons, the Court should grant certiorari to review the judgment and order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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December 22, 1980

[Footnote 9/ continued from preceding page.]

not arise, since the error is not one of admission of prejudicial testimony but rather of exclusion of evidence relevant to the question of voluntariness. See note 4, supra.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 79-2731, 79-2732

UNITED STATES OF AMERICA

v.

JAMES BOYD, A/K/A J.B.
JOSEPH MARTIER, CHRISTOPHER JASTRZEBSKI, JAMES WOLFE, STEVEN STEFANIAK, DAVID BLAIR, PATRICIA PISTININZI

Joseph Martier, Appellant in 79-2731
Christopher Jastrzebski, Appellant in 79-2732

Appeal from the United States District Court for the Western District of Pennsylvania
Crim. Nos. 79-00120-02/03

Argued September 18, 1980

Before: ADAMS, HUNTER AND HIGGINBOTHAM, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellants, namely, that (1) the trial

judge committed reversible error in denying the suppression motions of defendants Martier and Jastrzebski, particularly on the basis of their Miranda violation arguments; (2) the trial judge committed reversible error in admitting the redacted statements of defendants Martier and Jastrzebski over their objections; and (3) the trial judge committed reversible error in denying the motions of the defendants Martier and Jastrzebski, for mistrial following the disappearance of defendant Boyd, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: Sep 23 1980

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CRIMINAL
v.	)	DOCKET NO.
	)	79-120
(1) JAMES BOYD,	)	
(2) JOSEPH MARTIER	)	
(3) CHRISTOPHER Z. JASTRZEBSKI,	)	
(4) PATRICIA PISTININZI,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

Defendant Martier has moved to suppress statements made to agents of various police agencies by him while in custody on May 29, 1979 and May 30, 1979 following his arrest. He also moves to suppress all fruit of this allegedly poisonous tree. The defendant bases his motion on alleged violations by federal and state agents of 18 U.S.C. § 3501(c) (1976) and the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution. After considering the

evidence presented at a hearing held on the defendant's motion, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT Defendant Martier's motion to suppress is DENIED.

Specifically, we find that the defendant Martier, who had not been indicted or arraigned at the time that he made the statements in question, had no Sixth Amendment right to counsel because adversary proceedings had not yet commenced. See Moore v. Illinois, 434 U.S 220, 231 (1977); Brewer v. Williams, 430 U.S. 387, 400-01 (1977). Moreover, we hold that the agents did not violate the defendant's Fifth and Fourteenth Amendment rights. The agents gave the defendant a full "Miranda warning" upon his arrest. Although the defendant was understandably nervous at the time of his arrest, the evidence shows that his ability to understand his rights was not impaired. Subsequent statements made by the defendant in the hours folloiwng his arrest, although

not preceded by renewed Miranda warnings, are admissible. Miranda v. Arizona, 384 U.S. 436 (1966), does not require the police to repeat the warning where the defendant received a full warning at the time of his arrest, affirmatively indicated in response to the warning that he understood his rights, remained in the custody of the arresting officers until he made the statements, promptly indicated that he wished to cooperate with authorities, and understood the purpose of the subsequent questioning. See State v. Reilly, 269 N.W.2d 343, 347 (Minn. 1978). We find that the defendant did not request counsel prior to giving a taped statement, but rather, that he considered and rejected the possibility of obtaining counsel. Furthermore, the evidence would not support a finding that the defendant's will was overborne by the agents, thus making his statements involuntary. See Rogers v. Richmond, 365 U.S. 534, 544 (1961). The

defendant was a well-educated adult, who began to cooperate soon after agents took him into custody. The agents did not threaten or entice the defendant, but merely provided him with information that would enable him to better analyze his position. See United States v. Barfield, 507 F.2d 53, 55-57 (5th Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Williams, 479 F.2d 1138, 1140 (4th Cir.), cert. denied, 414 U.S. 1025 (1973).

Since this Court has found no violation of the defendant's rights under the Fifth, Sixth and Fourteenth Amendments, the defendants's Fourth Amendment claim - that the searches were the fruit of the illegally obtained statements - must also fail.

Finally, the agents did not violate 18 U.S.C. § 3501(c) (1976). The defendant had made a taped statement more than six hours after his arrest, but he had begun to cooperate soon after his arrest. Also, the agents

had contacted a magistrate at about 8:20 P.M., or soon after they had arrested the defendant at seven that evening; the magistrate told them that he would not be available at his office for an arraignment until the following morning. See United States v. Edwards, 539 F.2d 689, 691 (9th Cir.), cert. denied, 429 U.S. 984 (1976); United States v. Ortega, 471 F.2d 1350, 1362 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973); United States v. Gibbons, 437 F. Supp. 650, 653 (E.D. Pa. 1977), aff'd mem., 588 F.2d 824 (3d Cir. 1978).

Federal and state agents arrested Defendant Jastrzebski at the same time that they arrested Defendant Martier. On the evening of May 29, 1979 and the morning of May 30, 1979, Defendant Jastrzebski had an experience similar to that had by Defendant Martier. Therefore, like Defendant Martier, Defendant Jastrzebski has moved to suppress statements made by him and any fruit derived from these

statements on the grounds that the agents violated 18 U.S.C. § 3501(c) (1976) and the Fourth, Fifth, Sixth and Fourteenth Amendments. The evidence shows that the agents gave Defendant Jastrzebski a full Miranda warning on three occasions - at the time of his arrest, prior to questioning at the Drug Enforcement Administration office and prior to his giving a taped statement. For the reasons stated in the discussion of Defendant Martier's motion, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Jastrzebski's motion to suppress IS DENIED.

* * *

/s/ Maurice B. Cohill, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

Taped interview conducted by Special Agent Frank Schmotzer, U.S. Department of Justice, Drug Enforcement Administration, of Christopher Z. Jastrzebski at the Pittsburgh District Office at approximately 2:30 A.M. on May 30, 1979.

SCHMOTZER: Sir, before I ask you any questions, it is my duty to advise you of your rights. Do you understand that you have a right to remain silent? Please answer loud yes or no.

JASTRZEBSKI: Yes.

SCHMOTZER: Do you understand that anything you say can and will be used against you in court or other proceedings?

JASTRZEBSKI: Yes.

SCHMOTZER: Do you understand that you have the right to talk to a lawyer before I ask you any questions and to have him with you during the questioning?

JASTRZEBSKI: Yes.

SCHMOTZER: If you cannot afford or otherwise obtain a lawyer and you want one, a lawyer will be appointed for you by the U.S. Magistrate or the court and I will not ask any questions until he has been appointed?

JASTRZEBSKI: Yes.

SCHMOTZER: If you decide to answer now with or without a lawyer, you still have the right to stop the questioning at any time or to stop the questioning for the purpose of consulting a lawyer. Do you understand sir?

JASTRZEBSKI: Yes.

SCHMOTZER: However, you may waive the right to advice of counsel and your right to remain silent and you may answer questions or make a statement without consulting a lawyer if you so desire. Do you understand your rights sir?

JASTRZEBSKI: Yes.

SCHMOTZER: Sir, do you elect to waive those rights for the purpose of this interview?

JASTRZEBSKI: Yes.

SCHMOTZER: Okay. Now on the early evening of May 29th of '79, you and Joseph Martier were arrested for delivery of twenty to thirty pounds of PCP and a multi-pound quantity of a drug similar to MDA, 4-bromo-2, 5 dimethoxy amphetamine. Sir, did you acting with Joe Martier deliver the PCP and the 4-bromo to John Palmer?

JASTRZEBSKI: Yes.

SCHMOTZER: All right now, we've discussed the, uh, the scheme from its

inception to its culmination that resulted in your arrest and Martier's arrest yesterday here in Pittsburgh on May 29th. Uh, now when did the, the scheme begin? Uh, when was the inception of of the scheme to, uh, purchase, precursors, chemical equipment with the intent and finally the, the uh, and the actual manufacture of the PCP and the 4-bromo-2, 5 dimethoxy amphetamine, which I will simply refer to as 4-bromo, when did this whole thing begin sir?

JASTRZEBSKI: Uh, in, uh, two years ago. December.

SCHMOTZER: Okay. So it was in the, it was 19 . . .

JASTRZEBSKI: '77.

SCHMOTZER: '77, possibly early part of 1978.

JASTRZEBSKI: Right.

SCHMOTZER: All right. Why did you get involved in it?

JASTRZEBSKI: We ran into financial difficulties with a business and, uh, decided we'd repay everybody we owed then and make some PCP and, uh, get our feet back on the ground financially.

SCHMOTZER: What was the reason, uh, uh, of deciding to, uh, uh, manufacture the PCP?

JASTRZEBSKI: Uh, we researched it and realized that it was, uh, the uh, easiest thing to both sell and to make.

SCHMOTZER: Okay. All right, after you made the decision to manufacture the PCP, uh, did Joe Martier introduce you to James Boyd of Vandergrift, Pennsylvania?

JASTRZEBSKI: Yes.

SCHMOTZER: For what purpose?

JASTRZEBSKI: Uh, he was supposed to be able to move the PCP.

SCHMOTZER: At this particular time, did Boyd furnish you with a lab site to be used for the manufacture of PCP?

JASTRZEBSKI: Yes.

SCHMOTZER: And where was th lab site located?

JASTRZEBSKI: Uh, somewhere near Tarrentum, Pennsylvania.

SCHMOTZER: Can you describe the lab site?

JASTRZEBSKI: It was in a garage up in the hills overlooking, uh, I think its Natrona Heights.

SCHMOTZER: Okay. Who owned the lab site?

JASTRZEBSKI: A guy they call Big Bob.

SCHMOTZER: Can you describe Big Bob for me?

JASTRZEBSKI: Uh, he's about 6'3, 6'4, real heavy set, black hair.

SCHMOTZER: Okay. And do you know, does he have a legitimate occupation?

JASTRZEBSKI: He's a truck driver.

SCHMOTZER: Can you describe Boyd for me?

JASTRZEBSKI: Uhm, about 5'8, long brown hair, uh, thin.

SCHMOTZER: How old of a guy is he?

JASTRZEBSKI: Uh, close to forty.

SCHMOTZER: I didn't ask you. How old is Big Bob?

JASTRZEBSKI: Uh, probably around the same age.

SCHMOTZER: All right, Boyd furnished you a lab site. Uh, when did you, uh, first attempt to manufacture PCP?

JASTRZEBSKI: In, uh, January or February of, uh, '78.

SCHMOTZER: All right. And did you in fact make PCP or phencyclidine?

JASTRZEBSKI: Uh, we did but we didn't know if it was, uh, any good or not. We were afraid to let it out on the street.

SCHMOTZER: All right. Did you seek advice from another party?

JASTRZEBSKI: Uh, yes we did.

SCHMOTZER: And who was that party?

JASTRZEBSKI: Dan Haney.

SCHMOTZER: Can you spell his last name phonetically?

JASTRZEBSKI: Uh, H-a-n-e-y.

SCHMOTZER: Did he, uh, have an occupation? Was he a student?

JASTRZEBSKI: He's a student.

SCHMOTZER: All right. What school does he attend?

JASTRZEBSKI: University of Maryland, Baltimore campus.

SCHMOTZER: To your knowledge, does he attend that school at present?

JASTRZEBSKI: I have no idea.

SCHMOTZER: Can you describe Haney for me?

JASTRZEBSKI: Uh, he's thin, about 5'11, brown hair.

SCHMOTZER: How old of a kid?

JASTRZEBESKI: Uh, early twenties.

SCHMOTZER: Uh, do you know where he resided?

JASTRZEBSKI: Uh, somewhere, uh, near Baltimore.

SCHMOTZER: Okay. What kind of advice did he give you?

JASTRZEBSKI: Uh, he just told us we had the stuff. It was the right stuff.

SCHMOTZER: Did he, uh, modify the formula that you were using to make the PCP?

JASTRZEBSKI: No, he actually got it right out of a textbook. It was the same thing. It's just that he, uh . . .

SCHMOTZER: At this time did he give you a formula to make another drug?

JASTRZEBSKI: Uh, no, not at that time.

SCHMOTZER: Okay. And a, uh, short time later, did he give you a formula to make another drug?

JASTRZEBSKI: We asked him to make up this, uh, 4-bromo compound or whatever it is. If he knew how to make it or where we could find out how to make it.

SCHMOTZER: Okay. Why did you, why were you interested in making 4-bromo?

JASTRZEBSKI: Well, we, uh, weren't very comfortable making PCP and we didn't really want to make any, so we felt if we're gonna go through with it we'd make something, uh, uh . . .

SCHMOTZER: . . . less potent?

JASTRZEBSKI: Well, I don't know if it's . . .

SCHMOTZER: Is that an accurate description?

JASTRZEBSKI: . . . less potent, but something we felt more confortable with.

SCHMOTZER: Is it an easier process in comparison to the synthesis of PCP?

JASTRZEBSKI: Huh, uh. No they're about the same.

SCHMOTZER: Did you [sic] furnish you a formula, uh, to make 4-bromo?

JASTRZEBSKI: Yes, he did. He did. He didn't uh, we had to figure it out ourselves in the end, but he did help us.

SCHMOTZER: Okay. Did he receive any monies?

JASTRZEBSKI: We gave him $500.

SCHMOTZER: Did he receive any monies on his advice concerning the PCP?

JASTRZEBSKI: Yes he did.

SCHMOTZER: Was the amount about the same, less or more?

JASTRZEBSKI: Uh, it was a little less probably.

SCHMOTZER: After, uh, discussing the synthesis of PCP and 4-bromo with Haney, did you at a later time produce PCP?

JASTRZEBSKI: Uh, yes we did.

SCHMOTZER: And when, uh, approximately was that?

JASTRZEBSKI: Uh, somewhere around March '78.

SCHMOTZER: How much PCP did you make?

JASTRZEBSKI: Uh, about four ounces.

SCHMOTZER: And who got it?

JASTRZEBSKI: Uh, Jim Boyd.

SCHMOTZER: How much money did Boyd pay you for the four ounces of PCP?

JASTRZEBSKI: $2,800.00.

SCHMOTZER: And what lab site did you utilize to make the PCP?

JASTRZEBSKI: Uh, Tarentum.

SCHMOTZER: The garage that was owned by, uh, Big Bob?

JASTRZEBSKI: Right.

SCHMOTZER: In the summer of '78, did you and Joe make any PCP or 4-bromo?

JASTRZEBSKI: No we didn't.

SCHMOTZER: Okay. In the fall of 1978, did you purchase precursors and laboratory equipment to continue making PCP?

JASTRZEBSKI: Yes.

SCHMOTZER: Okay, can you explain the circumstances?

JASTRZEBSKI: Uh, uh, Jim Boyd and I went to, uh, New Jersey and went to all the big, uh, warehouses or builders or whatever, retailers and, uh, purchased precursors, uh, for PCP, everything that we thought was, uh, was considered (inaudible).

SCHMOTZER: Okay. Can you tell me the methods that you used to obtain the precursors and equipment?

JASTRZEBSKI: We, uh, set up, uh, answering services and, uh, we got purchase orders printed up with the phone number and the address of the answering service on it. If anything took more than a day to cop, we'd, ih, file a fictitious name in the state of Jersey.

SCHMOTZER: Okay. Who of you physically got the precursors and the laboratory equipment?

JASTRZEBSKI: Pardon me?

SCHMOTZER: Which of you got the, physically got the precursors and the laboratory equipment?

JASTRZEBSKI: We both did.

SCHMOTZER: Okay. You or Boyd simply entered the chemical outlet and obtained the needed equipment?

JASTRZEBSKI: Yes.

SCHMOTZER: After you got the equipment and precursors, what did you do with it?

JASTRZEBSKI: Uh, we brought it back to, uh, Western Pennsylvania and stored it in Jim Boyd's garage.

SCHMOTZER: And where is Boyd's garage located?

JASTRZEBSKI: Apollo.

SCHMOTZER: Okay. Uh, is the garage behind a house?

JASTRZEBSKI: Well it under a apartment.

SCHMOTZER: Under a apartment?

JASTRZEBSKI: Right.

SCHMOTZER: Do you know if the garage, uh, which is under the apartment is located on South Second Street in Apollo?

JASTRZEBSKI: I'm not sure if that's the street.

SCHMOTZER: Okay. This, uh, enterprise of you and Boyd getting the chemicals and equipment, how much did it cost you?

JASTRZEBSKI: Oh about $5,000.

SCHMOTZER: And who furnished those moneys?

JASTRZEBSKI: Boyd.

SCHMOTZER: Boyd furnished the moneys to

JASTRZEBSKI: Right.

SCHMOTZER: All right. Later in the fall or approximately early winter of 1978, did Joe Martier obtain precursors and selected laboratory equipment to manufacture the 4-bromo?

JASTRZEBSKI: Yes.

SCHMOTZER: And do you know what method of operation he used? Was it similar to, uh, your operation of creating a fictitious company or utilizing an answering service and, uh, getting order forms printed?

JASTRZEBSKI: Yes.

SCHMOTZER: To your knowledge, after Joe Martier obtained the precursors and equipment, where did he deliver these items?

JASTRZEBSKI: Uhm, he had rented a warehouse I think.

SCHMOTZER: He rented a warehouse?

JASTRZEBSKI: Right.

SCHMOTZER: Do you know where the warehouse is located?

JASTRZEBSKI: I have no idea.

SCHMOTZER: In late fall or early winter of '78, did you and Joe Martier produce another batch of PCP?

JASTRZEBSKI: Uh, when was that time period again?

SCHMOTZER: Late fall of '78, early winter of '78.

JASTRZEBSKI: Uh, yes.

SCHMOTZER: How much did you produce?

JASTRZEBSKI: Uh, 3 o-zs.

SCHMOTZER: And who got the three ounces of PCP?

JASTRZEBSKI: Uh, Jim Boyd.

SCHMOTZER: How much moneys did you get from Boyd?

JASTRZEBSKI: About $2,100.

SCHMOTZER: Okay. And what lab site did you utilize?

JASTRZEBSKI: His garage.

SCHMOTZER: In Apollo, Pennsylvania?

JASTRZEBSKI: Right.

SCHMOTZER: In December of 1978, did you rent a dwelling in Laurel Mountain Village which was later utilized as a laboratory site?

JASTRZEBSKI: Yes.

SCHMOTZER: And in December, did you and Joe Martier produce another batch of PCP?

JASTRZEBSKI: Yes.

SCHMOTZER: And how much did you make?

JASTRZEBSKI: About seven-eight pounds.

SCHMOTZER: How much of the seven to eight pounds did Boyd get?

JASTRZEBSKI: Uh, about 2 1/2.

SCHMOTZER: And how much did he pay per pound?

JASTRZEBSKI: $11,200.

SCHMOTZER: So Boyd paid you approximately $25,000 for the PCP?

JASTRZEBSKI: Well, he still owes some money.

SCHMOTZER: Okay. Now late in 1978 and during the months of January, February, March of '79, uh, did you, assisted by Boyd, obtain other precursors for the manufacture of the 4-bromo?

JASTRZEBSKI: Uh, yes.

SCHMOTZER: And during these occasions in January, February, March of '79, were, change that; did Wesner, Daniel Wesner assist in obtaining the chemicals for you and Boyd?

JASTRZEBSKI: Yes.

SCHMOTZER: Now after Wesner obtained the chemicals, who did he deliver the chemicals to?

JASTRZEBSKI: Probably Boyd, I don't really know.

SCHMOTZER: Okay. At a later time, were these chemicals or precursors for the manufacture of 4-bromo delivered to the lab site in Laurel Mountain Village?

JASTRZEBSKI: Uh, yes they were.

SCHMOTZER: By whom?

JASTRZEBSKI: Uhm

SCHMOTZER: If you know.

JASTRZEBSKI: I can't remember how they got there.

SCHMOTZER: Okay. In, during these months, January to March, did you produce batches of the 4-bromo?

JASTRZEBSKI: Yes we did.

SCHMOTZER: How much did you make?

JASTRZEBSKI: Bout, uh, six cut pounds.

SCHMOTZER: Six cut pounds and how many pounds of 4-bromo did Boyd get?

JASTRZEBSKI: Uh, about 4 1/2.

SCHMOTZER: All right. After the batches of 4-bromo were produced, uh, did you continue in making the PCP?

JASTRZEBSKI: Yes.

SCHMOTZER: Okay. Is it accurate to say the lab operations ceased in approximately April of 1979?

JASTRZEBSKI: Yes.

SCHMOTZER: The, uh, you, you and Joe Martier manufactured the PCP and the 4-bromo dimethoxy-amphetamine. Boyd received most of the PCP and 4-bromo.

JASTRZEBSKI: Yes.

SCHMOTZER: Is that correct? Was there another party who received substantial quantities of the PCP and 4-bromo?

JASTRZEBSKI: There was just one other party that got anything.

SCHMOTZER: Can you identify him?

JASTRZEBSKI: Uhm, it was the same person as last night.

SCHMOTZER: John Palmer?

JASTRZEBSKI: Yeah.

SCHMOTZER: He was arrested yesterday?

JASTRZEBSKI: Right.

SCHMOTZER: And when did he receive the drugs?

JASTRZEBSKI: Uh, last night.

SCHMOTZER: Okay. We had seized the drugs. Those are drugs . . .

JASTRZEBSKI: Right.

SCHMOTZER: . . . that we had seized?

JASTRZEBSKI: Right.

SCHMOTZER: To your knowledge, was a George Marchese assisting Boyd in the distribution of the PCP and 4-bromo?

JASTRZEBSKI: I, I know there's a George involved but I don't know his last name.

SCHMOTZER: Okay. Can you describe George for me please?

JASTRZEBSKI: He's, uh, a 5'8-5'9, thin with curly black hair.

SCHMOTZER: All right. Do you know where he, uh, resides?

JASTRZEBSKI: No I don't.

SCHMOTZER: All right. Chris, in March we had followed Boyd to Monzo's Howard Johnson at Monroeville. You and Joe, uh, and uh, another party were there. This other party, is this other party George?

JASTRZEBSKI: Yes.

SCHMOTZER: Okay. How much PCP and 4-bromo did you give George for distribution?

JASTRZEBSKI: We never handed anything to George.

SCHMOTZER: Okay. You distributed the 4-bromo and PCP to Boyd?

JASTRZEBSKI: Yes.

SCHMOTZER: To your knowledge did Boyd distribute those drugs to uh, George?

JASTRZEBSKI: Yes.

SCHMOTZER: Uh, you were present on how many occasions when you saw Boyd give drugs to Marches?

JASTRZEBSKI: I never saw . . .

SCHMOTZER: To George? I'm sorry.

JASTRZEBSKI: . . . I never saw him give him any drugs.

SCHMOTZER: Okay. What makes you believe that Boyd did give drugs to George?

JASTRZEBSKI: That's what I was told.

SCHMOTZER: By whom?

JASTRZEBSKI: Uh, Boyd.

SCHMOTZER: All right. Sir, to your knowledge, uh, we've discussed it, uh, there's, there are, there were frequent times when Boyd was not in Vandergrift, uh, you suspect or believe that, uh, Boyd's operation was, was continued by a Sonny Shaw.

JASTRZEBSKI: I, I don't know that for a fact.

SCHMOTZER: Okay. Uh, isn't it true Boyd made the statement that he had a trusted friend who directed his operation while he was absent?

JASTRZEBSKI: Yes it is.

SCHMOTZER: And to your knowledge, uh, Boyd's, to your knowledge, uh, Boyd's only truested friend during this time was Sonny Shaw?

JASTRZEBSKI: He's the only one that I knew of.

SCHMOTZER: Okay.

JASTRZEBSKI: But I didn't know any of his friends.

SCHMOTZER: All right sir. All right the, uh, interview ended at approximately ten minutes after three on May 30, 1979. Sir, before I, uh, uh, stopethe [sic] tape, uh, do you, uh, wish to make any comments?

JASTRZEBSKI: Uh, no.

SCHMOTZER: All right. Was this taped statement freely and voluntarily given?

JASTRZEBSKI: Yes.

SCHMOTZER: Have you been offered any rewards or received any threats or been forced to make this statement?

JASTRZEBSKI: No.

SCHMOTZER: Is this statement true, and and accurate to the best of your ability?

JASTRZEBSKI: Yes.

SCHMOTZER: All right sir. Thank you for your cooperation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal No. 79-120
	)	
JAMES BOYD, JOSEPH MARTIER, CHRISTOPHER JASTRZEBSKI and PATRICIA PISTININZI,	)	Criminal No. 79-156
	)	
	)	
Defendants	)	

EXCERPTS FROM TRANSCRIPT OF TRIAL PROCEEDINGS

Transcript of Jury Trial held beginning September 21, 1979, United States District Court, Pittsburgh, Pennsylvania, before Honorable Maurice B. Cohill, Jr., District Judge.

* * *

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THE COURT: Okay. Well, what do you have to say about the redacted statement of Jastrzebski?

MR. GREEN: Your Honor, I think a confession -- The term "confession" means the words of the confessor, and I think this is a

problem in every joint trial where the government attempts to use confessions that implicate other persons; and I think the purpose of the Bruton rule was to eliminate that type of thing.

I don't think every confession or statement that the government comes into possession of can in fact be properly redacted so as to become usable in a criminal trial, and perhaps this is one of those situations.

* * *

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Because what we have, as far as the statement of Jastrzebski is concerned, a page and maybe six or seven lines on a second page, not in the language of Jastrzebski at all and not in response to the questions that were asked of him during the taking of the statement.

Now if the government can properly redact this statement or confession so that it presents it in the language and words and context of what it is, then they have a right

to do that under the law that they cite to the Court.

But I certainly don't think that the summary prepared by them is a confession of Jastrzebski. It is something else. It is a new thing created by government counsel.

* * *

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A confession, when it is admitted, what it means is to be interpreted by a jury. The jury can make whatever interpretation of the language contained in a confession that they care to make.

Now in this instance, if you use this summary that they call a redacted confession, the jury will be interpreting the words of the United States Attorney who prepared the summary, not the words of the defendant.

I think the initial stage has to be overcome.

* * *

THE COURT: But . . . the way I read Parker, if Boyd weren't in the thing, Jastrzebski's and Martier's statements would be admissible, because they both made statements, and they are not to my knowledge inconsistent with each other; and under this Parker v. Randolph case they would be admissible.

* * *

I'm just saying he ought to be instructed when he testifies to limit it to this redacted statement. I'm not suggesting he read this.

I think it is more appropriate that he not read it,

unless he needs to refresh his recollection.

But certainly this should not go to the jury.

MR. ANTKOWIAK: No.

Your Honor, the reason why we had this typed out and I was in fact intending on having the agent read from this was simply so

that the agent would not in any way err in his extemporaneous recounting and use the name of another co-defendant inadvertently. I just wanted to avoid that error.

THE COURT: I think it is admirable, but I think it would be more appropriate, unless his recollection fails, not to use the notes and to use his memory; and, you know, you could instruct him to that effect; and if you ask him short, precise questions, rather than having him wander all over the place, trying to tell from A to Z of the confession, without having him questioned, I think we eliminate prejudice; and what we are trying to get here is a fair trial, the ultimate object.

Off the record.

(Discussion off the record.)

MR. ANTKOWIAK: Just so I understand, -- and the Court can correct me, -- it would be permissible for the agent to give his testimony regarding the confessions in substanti-

ally the form of this redacted statement that I have prepared?

THE COURT: Yes.

MR. ANTKOWIAK: Fine.

THE COURT: As long as he limits what Jastrzebski said to what Jastrzebski said about Jastrzebski, and not what Jastrzebski said about anybody else.

MR. ANTKOWIAK: Absolutely.

THE COURT: I think technically, under Parker, Jastrzebski could talk about Martier, but I think it would be cleaner not to.

MR. ANTKOWIAK: I agree with the Court.

THE COURT: I don't think it would be reversible error if he did. It would be reversible error if he started talking about Boyd.

MR. GREEN: Your Honor, you do intend, I assume, -- if you allow these agents to testify as to what they heard these various defendants say, which is in essence, I think,

what the ruling is, you still, I assume, are going to submit the question and the issue of voluntariness of the statements, no matter how they are introduced, to this jury?

THE COURT: Well, you fellows are going to have an opportunity to give me points.

MR. GREEN: I mean as far as the government's burden of proving that before any of this evidence is admissible. I'm not talking now about the evidentiary stage.

As I understand the law, -- and I want to raise this now so we don't get into some issue in front of the jury.

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Even though we have had a suppression hearing, it is my understanding of the law that even though you denied the motion to suppress, the government still has the burden of proving to the jury's satisfaction that any confession or statement was voluntary.

THE COURT: Well, I think that was one of the preliminary questions that you would

ask the agent, yes, and, of course, you can cross examine them on that.

* * *

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MR. GREEN: I just want to make it clear on the record that we are not agreeing and maintaining a similar objection.

THE COURT: I understand. Your objections to the method in which we are going to do this are overruled.

* * *

EXCERPTS FROM TESTIMONY OF FRANK SCHMOTZER

Q Now, Agent Schmotzer, could you relate to the jury the statement which Mr. Jastrzebski gave to you, beginning at approximately, was it 12:30 a.m. on May 30th?

MR. GREEN: If the Court please, I would like the record to reflect my objection as made in chambers in prior proceedings.

* * *

THE COURT: Objections are noted and overruled.

BY MR. ANTKOWIAK:

Q Could you relate the statement, Agent Schmotzer?

A Yes sir. I began getting this information from Jastrzebski about 11:45 on the evening of May 29th, and we, the interview was eventually terminated at about 3:10 that morning. So we talked from 11:45 on May 29th, 11:45 p.m. on May 29th until approximately 3:10 the following morning on

May 30th. And he related the following account.

In late 1977 he had lost moneys from an unsuccessful legitimate business venture, and to make moneys he researched and schemed to manufacture PCP. He considered PCP the easiest drug to make or to sell.

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In the early part of 1978 a batch or quantity of PCP had been manufactured. During this time he obtained a formula for the manufacturing of the 4 bromo 2, 5 dimethoxy-amphetamine, and about March, 1978, he manufactured approximately four ounces of PCP, which he sold for $2800.

Also in the fall of 1978 he obtained precursors from chemical warehouses in New Jersey. These precursors or chemicals were used for the manufacture of PCP.

To obtain these chemicals he simply created a fictitious company and contracted

with a telephone answering service to take the messages.

In the late fall of 1978, approximately three ounces of PCP was manufactured and sold for $2100. In December of 1978, he rented the dwelling at Laurel Mountain Village. He utilized it as a lab site. And in December, approximately seven, eight pounds of PCP had been manufactured.

MR. CERASO: If the Court please, may we approach the bench?

* * *

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BY MR. ANTKOWIAK:

Q Agent Schmotzer, I believe at the break we were discussing the statement that Mr. Jastrzebski had given to you on the evening of May 29th and the early morning hours of May 30th, is that correct?

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A That is correct, sir.

Q All right. Now, Agent Schmotzer, what did Mr. Jastrzebski tell you that he had done in December, approximately December of 1978?

A Jastrzebski stated he had rented a dwelling in Laurel Mountain Village. He utilized it as a lab site. He manufactured approximately seven to eight pounds of PCP, some of it was sold for approximately $11,000 a pound. Other quantities of it were given on consignment.

Q Now, Agent Schmotzer, did Mr. Jastrzebski tell you anything about what he had done with respect to obtaining certain precursor chemicals in late 1978 and early 1979?

A He did, sir. He stated in very late 1978 and during the first few months of 1979 he had obtained precursor chemicals for the manufacture of the 4 bromo 2, 5 dimethoxyamphetamine. He was assisted by Daniel Wesner in obtaining these chemicals.

Q What did he tell you that he had done with the chemicals that he had obtained?

A He had used these chemicals to manufacture approximately six pounds of the dimethoxyamphetamine during the months of January to March, 1979. He stated he had distributed approximately 4-1/2 pounds of the 4 bromo 2, 5 dimethoxyamphetamine.

MR. ANTKOWIAK: May I have a moment, Your Honor?

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BY MR. ANTKOWIAK:

Q Sir, did Mr. Jastrzebski admit to you that he had distributed a certain quantity of PCP and MDA to John Palmer on May 9th?

A Yes. He stated that he had distributed a large quantity of the PCP and the MDA to John Palmer on May 29th.

Q What time, sir, did your interview of Mr. Jastrzebski conclude?

A It was approximately 3:10 a.m. that morning, on the morning of May 30th.

EXCERPTS FROM THE COURT'S
INSTRUCTIONS TO THE JURY

1647

* * *

As far as statements by the defendnts are concerned, before considering any statement claimed to have been made by a defendant outside of court and after an alleged crime had been committed, you must find that the defendant had knowingly waived his constitutional rights before giving the statement.

After arrest, a defendant is entitled to be informed that he is entitled to certain rights commonly

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known as Miranda rights or Miranda warnings, and there must be positive proof that such a defendant understands those rights.

Prior to giving a statement, the defendant must knowingly waive those rights, but even if you find that the defendant had knowingly waived his Miranda rights prior to giving a statement, you must also find that

the defendant had voluntarily given the statement.

In determining whether any statement was voluntarily made, the jury should consider the evidence concerning such a statement with caution and great care and should give such weight to the statement as the jury feels it deserves under all the circumstances.

The jury may consider in that regard such factors as the age, sex, training, education, occupation and physical and mental condition of the defendant, his treatment while under interrogation, and all other circumstances in evidence surrounding the making of the statement.

Of course, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant on trial.

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